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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Joint Application by SBC Communications)
Inc., Southwestern Bell Telephone Company,)
and Southwestern Bell Communications) CC Docket No. 00-217
Services, Inc. d/b/a Southwestern Bell Long)
Distance for Provision of In-Region,)
InterLATA Services in Kansas and Oklahoma)

EVALUATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

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DOJ Texas I Evaluation	Evaluation of the United States Department of Justice, <i>In re: Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas</i> , CC Docket No. 00-4 (Feb. 14, 2000) (“DOJ Texas I Evaluation”).
DOJ New York Evaluation	Evaluation of the United States Department of Justice, <i>In re: Application by New York Telephone Company (d/b/a Bell Atlantic - New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in New York</i> , CC Docket No. 99-295 (Nov. 1, 1999) (“DOJ New York Evaluation”).
DOJ Louisiana II Evaluation	Evaluation of the United States Department of Justice, <i>In re: Second Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana</i> , CC Docket No. 98-121 (Aug. 19, 1998) (“DOJ Louisiana II Evaluation”).
DOJ South Carolina Evaluation	Evaluation of the United States Department of Justice, <i>In re: Application by BellSouth Corp., BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in South Carolina</i> , CC Docket No. 97-208 (Nov. 4, 1997) (“DOJ South Carolina Evaluation”).

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DOJ Oklahoma I Evaluation	Evaluation of the United States Department of Justice, <i>In re: Application of SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in the State of Oklahoma</i> , CC Docket No. 97-121 (May 16, 1997) (“DOJ Oklahoma I Evaluation”).
FCC Orders	
<i>FCC Texas Order</i>	Memorandum Opinion and Order, <i>In re: Application of SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas</i> , FCC No. 00-238 (June 30, 2000), (“FCC Texas Order”).
<i>FCC New York Order</i>	Memorandum Opinion and Order, <i>In re: Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Services in the State of New York</i> , 15 FCC Rcd 75 (Dec. 22, 1999), <i>aff’d</i> , <i>AT&T Corp. v. FCC</i> , 220 F.3d 607 (D.C. Cir. 2000) (“FCC New York Order”).
<i>FCC Michigan Order</i>	Memorandum Opinion and Order, <i>In re: Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan</i> , 12 FCC Rcd 20543 (Aug. 19, 1997) (“FCC Michigan Order”).

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Kansas State Commission Orders, Recommendations, and Reports	
<i>KCC 271 Report</i>	Report of the State Corporation Commission of the State of Kansas on Southwestern Bell Telephone Company’s Compliance with Section 271, CC Docket No. 00-217 (Nov. 20, 2000) (“ <i>KCC 271 Report</i> ”).
<i>KCC NRC Order</i>	Order Regarding Non-Recurring Charges for Unbundled Network Elements, <i>In the Matter of the Application of Sprint Communications Company, L.P., United Telephone Company of Kansas, United Telephone Company of Eastern Kansas, United Telephone Company of South Central Kansas, and United Telephone Company of Southeastern Kansas for the Commission to Open a Generic Proceeding on Southwestern Bell Telephone Company’s Rates for Interconnection, Unbundled Elements, Transport and Termination, and Resale</i> , Docket No. 97-SCCC-149-GIT, November 3, 2000 (Attach. 12 to KCC 271 Report) (“ <i>KCC NRC Order</i> ”).
<i>KCC Staff 271 Report</i>	Staff’s Recommendation on SWBT’s K2A, <i>Southwestern Bell Telephone Co. - Kansas’ Compliance with Section 271 of the Federal Communications Act of 1996</i> , Docket No. 97-SWBT-411-GIT (Aug. 21, 2000) (App. C - KS, Vol. 28a-b, Tab 259) (“ <i>KCC Staff 271 Report</i> ”).
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<i>OCC Final 271 Order</i>	Order Regarding Recommendation on 271 Application Pursuant To Telecommunications Act of 1996, <i>Application of the Attorney General of the State of Oklahoma, et al., To Explore Southwestern Bell Telephone Co.’s Compliance with Section 271(c) of the Telecommunications Act of 1996</i> , Cause No. PUD 970000560, Order No. 445180 (Sept. 28, 2000) (App. C - OK, Vol. 25a-c, Tab 275)(“ <i>OCC Final 271 Order</i> ”).

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OCC Alt. Reg. Order	Order No. 437259, Approving Stipulation, <i>Application of Southwestern Bell Telephone Company for Relief from Rate Base/Rate of Return Regulation and Seeking Approval of Its Transition Plan for Alternative Regulation</i> , Cause No. 990000613, December 10, 1999 (App. G, Vol. 3, Tab 29) ("OCC Alt. Reg. Order").
OCC Pricing Order	Order Adopting Amended Report and Recommendation of the Administrative Law Judge, <i>Application of Cox Oklahoma Telecom, Inc., for a Determination of the Costs of, and Permanent Rates for, the Unbundled Network Elements of Southwestern Bell Telephone Company</i> , Cause Nos. PUD 970000213, PUD 970000442, Order No. 424864 (July 17, 1998) (App. G, Vol. 2, Tab 17) ("OCC Pricing Order").
Oklahoma ALJ Pricing Recommendation	Amended Report and Recommendation of the Administrative Law Judge, <i>Application of Cox Oklahoma Telecom, Inc., for a Determination of the Costs of, and Permanent Rates for, the Unbundled Network Elements of Southwestern Bell Telephone Company, In the Matter of the Joint Application of Southwestern Bell Telephone Company and AT&T Communications of the Southwest, Inc. for a Determination of Costs and Permanent Rates for Certain Southwestern Bell Telephone Company Services</i> , Cause Nos. PUD 970000213, PUD 970000442 (June 30, 1998), SBC <i>Ex Parte</i> Submission to the FCC, CC Docket No. 00-217 (Nov. 29, 2000) ("Oklahoma ALJ Pricing Recommendation").

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Filings Related to SBC's Application	
SBC Brief	Brief in Support of Joint Application by SBC Communications Inc. et al., <i>In re: Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma</i> , CC Docket No. 00-217 (Oct. 26, 2000) ("SBC Brief").
SBC October 2000 Kansas/Oklahoma Performance Data	SBC Telecommunications, Inc., States of Kansas and Oklahoma Measurement Tracking for October 2000, SBC <i>Ex Parte</i> Submission to the FCC, CC Docket No. 00-217 (Nov. 27, 2000) ("SBC October 2000 Kansas/Oklahoma Performance Data").
SBC October 2000 Texas Performance Data	SBC Telecommunications, Inc., State of Texas Performance Measurement Tracking for October 2000, SBC <i>Ex Parte</i> Submission to the FCC, CC Docket No. 00-217 (Dec. 1, 2000) ("SBC October 2000 Texas Performance Data").
SBC UNE-Platform Rate Comparison <i>Ex Parte</i>	SBC Telecommunications, Inc., SBC <i>Ex Parte</i> Submission to the FCC, CC Docket No. 00-217 (Dec. 1, 2000) ("SBC UNE-Platform Rate Comparison <i>Ex Parte</i> ").
SBC Pricing Chart <i>Ex Parte</i>	SBC Telecommunications, Inc., Texas, Kansas and Oklahoma "Price Comparison with Highlights", <i>Ex Parte</i> Submission to the FCC, CC Docket No. 00-217 (Nov. 28, 2000) ("SBC Pricing Chart <i>Ex Parte</i> ").
Affidavits/Declarations	
Adelphia Lippold Decl.	Declaration of Brian M. Lippold, <i>attached to</i> Comments of Adelphia Business Solutions Investment, LLC ("Adelphia Lippold Decl.").
AT&T Baranowski/Flappan Decl.	Declaration of Michael R. Baranowski and Robert P. Flappan on Behalf of AT&T Corp., <i>attached to</i> Comments of AT&T Corp. In Opposition to SBC Communications, Inc.'s Section 271 Joint Application for Kansas an Oklahoma ("AT&T Baranowski/Flappan Decl.").

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DOJ Schwartz Aff.	Affidavit of Dr. Marius Schwartz on behalf of the United States Department of Justice (May 14, 1997), available at < http://www.usdoj.gov/atr/public/comments/sec271/bellatlantic/3813_exhibits.htm >, and <i>attached to</i> DOJ New York Evaluation as Ex. 1 (“DOJ Schwartz Aff.”).
DOJ Schwartz Supplemental Aff.	Supplemental Affidavit of Dr. Marius Schwartz on behalf of the United States Department of Justice (Nov. 3, 1997) (“DOJ Schwartz Supplemental Aff.”), available at < http://www.usdoj.gov/atr/public/comments/sec271/bellatlantic/3813_exhibits.htm >, and <i>attached to</i> DOJ New York Evaluation as Ex. 2.
KMC Moseley Aff.	Affidavit of Paul Moseley, <i>attached to</i> Comments of KMC Telecom (“KMC Moseley Aff.”).
MCI McMillon/Lichtenberg Decl.	Joint Declaration of Terri McMillon and Sherry Lichtenberg on Behalf of WorldCom, Inc., <i>attached to</i> Comments of WorldCom, Inc. on the Application by SBC Communications for Authorization to Provide In-Region, InterLATA Services in Kansas and Oklahoma (“MCI McMillon/Lichtenberg Decl.”).
SBC Dysart Aff.	Affidavit of William R. Dysart, <i>attached to Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma</i> , CC Docket No. 00-217, App. A as Tab 18 (“SBC Dysart Aff.”).
SBC Dysart/Noland/Smith Aff.	Affidavit of William R. Dysart, Brian D. Noland, and David R. Smith, <i>attached to Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma</i> , CC Docket No. 00-217, App. A - Supp. (“SBC Dysart/Noland/Smith Aff.”).

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SBC Ham Aff.	Affidavit of Elizabeth A. Ham, <i>attached to Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma</i> , CC Docket No. 00-217, App. A as Tab 15 ("SBC Ham Aff.").
SBC Jones Aff.	Affidavit of James L. Jones, <i>attached to Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma</i> , CC Docket No. 00-217, App. A as Tab 10 ("SBC Jones Aff.").
SBC McLaughlin Aff.	Affidavit of Weldon McLaughlin, <i>attached to Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma</i> , CC Docket No. 00-217, App. A as Tab 16 ("SBC McLaughlin Aff.").
SBC Noland/Smith Aff.	Joint Affidavit of Brian D. Noland and David R. Smith, <i>attached to Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma</i> , CC Docket No. 00-217, App. A as Tab 17 ("SBC Noland/Smith Aff.").
SBC Ries Oklahoma Aff.	Affidavit of Thomas G. Ries, <i>attached to Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma</i> , CC Docket No. 00-217, App. A as Tab 12 ("SBC Ries Oklahoma Aff.").

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SBC Smith/Johnson Aff.	Joint Affidavit of J. Gary Smith and Mark Johnson, <i>attached to Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma</i> , CC Docket No. 00-217, App. A as Tab 1 (“SBC Smith/Johnson Aff.”).
SBC Sparks Aff.	Affidavit of Rebecca L. Sparks, <i>attached to Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma</i> , CC Docket No. 00-217, App. A as Tab 13 (“SBC Sparks Aff.”).
Verizon Taylor Decl.	Declaration of William E. Taylor, <i>attached to Brief in Support of Application by Verizon New England for Authorization to Provide In-Region, InterLATA Services in Massachusetts, In re: Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and Verizon Global Networks Inc., for Authorization To Provide In-Region, InterLATA Services in Massachusetts</i> , CC Docket No. 00-176 (Sept. 22, 2000) at App. A, Vol. 5, Tab 6 available at < http://newscenter.verizon.com/policy/mass/declarations/ > (“Verizon Taylor Decl.”).
Initial Third Party Comments	
Adelphia Comments	Comments of Adelphia Business Solutions Investment, LLC, CC Docket No. 00-217 (Nov. 15, 2000) (“Adelphia Comments”).
AT&T Comments	Comments of AT&T Corp. In Opposition to SBC Communiation, Inc.’s Section 271 Joint Application for Kansas an Oklahoma, CC Docket No. 00-217 (Nov. 15, 2000) (“AT&T Comments”).
ConnectSouth Comments	Comments of ConnectSouth Communications in Opposition to the Section 271 Application of SBC Communications, Inc., in Kansas and Oklahoma, CC Docket No. 00-217 (Nov. 15, 2000) (“ConnectSouth Comments”).

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Cox Comments	Comments of Cox Communications, Inc., CC Docket No. 00-217 (Nov. 15, 2000) ("Cox Comments").
KMC Comments	Comments of KMC Telecom, CC Docket No. 00-217 (Nov. 15, 2000) ("KMC Comments").
MCI Comments	Comments of WorldCom, Inc. on the Application by SBC Communications for Authorization to Provide In-Region, InterLATA Services in Kansas and Oklahoma, CC Docket No. 00-217 (Nov. 15, 2000) ("MCI Comments").
Sprint Comments	Petition to Deny of Sprint Communications Company, L.P., CC Docket No. 00-217 (Nov. 15, 2000) ("Sprint Comments").
Miscellaneous	
Ernst and Young Report	Report of Independent Accountants (Ernst & Young LLP Oct. 24, 2000) (App. G, Tab 44) ("Ernst and Young Report").
FCC Common Carrier Statistics	Federal Communications Commission, <i>Statistics of Communications Common Carriers</i> (September, 1999), available at < http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC_State_Link/SOCC/scc99idx.pdf > ("FCC Common Carrier Statistics").
SBC Amended Notice of Election	Amended Notice of Election, <i>Application of Southwestern Bell Telephone Company for Relief from Rate Base/Rate of Return Regulation and Seeking Approval or its Transition Plan for Alternative Regulation</i> , Cause No. PUD 990000613, (May 11, 2000), SBC <i>Ex Parte</i> Submission to the FCC, CC Docket No. 00-217 (Dec. 1, 2000) ("SBC Amended Notice of Election").

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InterLATA Services in Kansas and Oklahoma)	

EVALUATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

Introduction and Summary

SBC's joint application to offer long distance services in the states of Kansas and Oklahoma is based in substantial part on the template developed in Texas.¹ Many of the terms and conditions governing the availability of interconnection and unbundled network elements (UNEs) in Kansas and Oklahoma -- the ground rules for local competition -- match those that were evaluated favorably by the Department of Justice (DOJ) and approved by the Commission in SBC's earlier Texas application. And, both the Kansas Corporation Commission (KCC) and the Oklahoma Corporation Commission (OCC) have predicated their support for SBC's application to some degree on the success of the Texas template² in addition to evaluating state-specific performance results.

¹ See, e.g., SBC Brief at i-ii, 2, 19, 73-4.

² See, e.g., SBC Brief at 2; OCC Final 271 Order at 3, 150; KCC Staff 271 Report at 8, 10, 18, 27.

The Department's evaluation of this joint application focuses on two issues: the prices at which SBC provides interconnection and UNEs in Kansas and Oklahoma, and the sufficiency of SBC's evidence that its provision of nondiscriminatory access to operational support systems (OSS) in Texas supports a finding of nondiscriminatory access in Kansas and Oklahoma.

Both the recurring and nonrecurring charges for the use of UNEs in Oklahoma, and the nonrecurring charges for the use of UNEs in Kansas, are substantially greater than the comparable charges in Texas, which the Commission has found to be appropriately cost based. There is no obvious difference in costs between and among the states that would account for the difference in prices, and there are some indications in the record that the prices in Kansas and Oklahoma were not determined in accordance with the Commission's methodological requirements. Moreover, competitive local exchange carriers (CLECs) have chosen to use UNEs to a very limited extent in Kansas and Oklahoma, a fact that could suggest that the prices of those UNEs are not appropriately based on cost. In these circumstances, we believe the Commission should undertake an independent determination whether these prices conform to the requirements of the 1996 Act and the Commission's rules, rather than relying on the decisions of the KCC and OCC to approve those prices.

SBC's contention that it provides nondiscriminatory access to OSS in Kansas and Oklahoma is supported largely by evidence that its wholesale services in those states are provided with the same OSS that the Commission examined and approved in SBC's Texas application. The evidence contained in SBC's application, however, is ambiguous and incomplete in important respects. Because of these shortcomings, the evidence does not

establish clearly that acceptable wholesale performance in Texas will necessarily be duplicated in Kansas and Oklahoma. The Commission should require more evidence and clarification in these areas.

I. Entry in the Local Telecommunications Markets in Kansas and Oklahoma

To determine whether SBC has fully and irreversibly opened the local telecommunications market to competition for both business and residential customers, the Department examines the three modes of entry contemplated by the Telecommunications Act of 1996³: facilities-based entry, the use of unbundled elements of the incumbent's network and resale of the incumbent's services.⁴ The Department first looks to actual competitive entry because the experience of competitors seeking to enter a market can provide highly probative evidence about the presence or absence of artificial barriers to entry.⁵ The degree to which such existing competition is broad based determines the weight the Department places on it as evidence.⁶

For those entry modes where competitively significant entry is reasonably foreseeable but broad-based commercial entry is absent, the Department examines whether new technical and operational arrangements are available and working to support the entry mode, and whether

³ Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in various sections of 47 U.S.C.).

⁴ See DOJ Schwartz Aff. ¶¶ 149-192; DOJ Schwartz Supplemental Aff. ¶¶ 26-60; DOJ Oklahoma I Evaluation at vi-vii, 36-51.

⁵ See, e.g., DOJ Oklahoma I Evaluation at vi-vii, 41-42.

⁶ See, e.g., DOJ Schwartz Aff. ¶ 176.

performance benchmarks have been established to detect backsliding by the incumbent after long distance entry.⁷ Small market shares held by competitors or even the absence of entry, standing alone, are neither conclusive evidence that a market remains closed to competition nor a basis for denying an application under section 271.⁸

A. Competitive Entry in Oklahoma

CLECs using all modes of entry serve approximately 115,000 lines, or 6.3 percent of the lines, in SBC's service area in Oklahoma.⁹ This level of CLEC retail penetration, in the aggregate, is approximately 70-80 percent of the levels in New York and Texas at the time applications were filed in those states.¹⁰ CLEC business lines in Oklahoma outnumber residential lines by a 57:43 proportion.¹¹ In contrast, 70 percent of the access lines in Oklahoma serve residential customers.¹² Long-distance carriers appear to provide local service to

⁷ DOJ Oklahoma I Evaluation at 48-51.

⁸ *See, e.g., id.* at 29-30; DOJ Louisiana II Evaluation at 26-27.

⁹ *See* SBC Brief at iii; SBC Smith/Johnson Aff. ¶ 12, tbl. 3. Counting CLEC lines as the sum of E911 + UNE-P + Resale, there are approximately 1.8 million access lines in SBC's Oklahoma service area.

¹⁰ In New York, CLECs served approximately 8.9% of total access lines. DOJ New York Evaluation at 9. In Texas, SBC estimated that CLECs served 12.8% of total access lines, but the Department concluded that CLECs actually served closer to 8.0% of the market. DOJ Texas I Evaluation at 8-9.

¹¹ *See* SBC Smith/Johnson Aff. ¶ 11, tbl. 2; ¶ 40, tbl. 9. Counting CLEC lines as the sum of E911 + UNE-P + Resale, there are 49,000 CLEC residential lines and 66,000 CLEC business lines in SBC's Oklahoma service area.

¹² *See FCC Common Carrier Statistics* at 22 tbl. 2-4. Department calculations based on the FCC data indicate that approximately 70% of all Oklahoma access lines are residential.

approximately 30,000 lines in the state, or one and one-half percent of the total lines in the state.

Residential lines account for fewer than 100 of the total lines.¹³

Facilities-based CLEC lines comprise three percent, or 55,000, of Oklahoma lines.¹⁴ This percentage of facilities-based lines compares with three and one-half percent in Texas and five and one-half percent in New York at the times of their 271 applications.¹⁵ Approximately 80 percent of these lines serve business, but 12,000 serve residential customers.¹⁶ A single cable provider serves virtually all the facilities-based residential lines in Oklahoma.¹⁷

Resale of SBC service also makes up three percent of the lines in SBC's Oklahoma service area and is the primary means of residential entry. Thirty-seven thousand residential lines

¹³ See SBC Smith/Johnson Aff. Attach. F ¶¶ 4, 26, 28 (data tables). The long distance carriers, as a group, have 160,000 telephone numbers assigned in Oklahoma, presumably to allow them to provide local telephone service in Oklahoma when they chose to do so or when circumstances permit.

¹⁴ See SBC Smith/Johnson Aff. ¶ 22 tbl. 5 (55,000 of 115,000 CLEC lines are facilities-based, as measured by E911 listings.). The number of facilities-based lines includes lines served by stand-alone loops and thus is not comprised of "pure" facilities-based lines.

¹⁵ See DOJ Texas I Evaluation at 8, 9 (Facilities-based CLEC lines were estimated to comprise 350,000-400,000 of the lines in SBC's Texas service area); *FCC New York Order* ¶14 (showing 651,793 facilities-based lines in New York at the time of application).

¹⁶ See SBC Smith/Johnson Aff. ¶ 22 tbl. 5 (12,000 or 22 % of CLEC facilities-based lines are residential lines.).

¹⁷ See Cox Comments at 5.

are served through resale.¹⁸ Long distance carriers have made no significant use of resale in Oklahoma.¹⁹

The UNE-platform constitutes one-third of one percent (or approximately 6,000) of the lines in SBC's Oklahoma service area. Fourteen residential customers are served over the platform in the state.²⁰ The limited use of UNE-platform in Oklahoma contrasts sharply with the New York and Texas markets, where the use of UNE-platform has accounted for rapid CLEC expansion into the residential market.²¹ DSL entry in Oklahoma is minimal. There are 548 CLEC DSL lines in Oklahoma, which constitute 0.03 percent of total lines in Oklahoma.²²

¹⁸ See SBC Smith/Johnson Aff. ¶ 40 tbl. 9 (55,000 CLEC lines in Oklahoma are provided by resale of SBC service.).

¹⁹ See SBC Smith/Johnson Aff. Attach. F ¶¶ 4, 26, 28.

²⁰ See SBC Smith/Johnson Aff. ¶ 11 tbl. 2; ¶ 22 tbl. 5. (Calculations from these tables indicate 6,288 UNE-Platform lines are in use in Oklahoma, and fourteen of these lines serve residential customers.).

²¹ At the time of the New York application, approximately 152,000 lines were served through the UNE-platform. *FCC New York Order* ¶ 14. By July 2000, CLECs served one million additional customers over the UNE-platform, almost 95% of them residential. DOJ Massachusetts Evaluation at 6, n.26; See also Verizon Taylor Decl. ¶ 21. At the time of the second Texas application, approximately 244,000 lines were served through the UNE-Platform. *FCC Texas Order* ¶ 5. By September 2000, CLECs in Texas served 569,000 customers over the UNE-Platform. The UNE-Platform accounted for approximately 8.5% and 5% of total state lines in New York and Texas, respectively, by the end of summer 2000.

²² See SBC October 2000 Kansas/Oklahoma Performance Data, Oklahoma PM 65-08 (Trouble Report Rate (%) for DSL) at 271- No. 65c (548 DSL lines in service as of Sept. 2000).

B. Competitive Entry in Kansas

CLECs using all modes of entry serve approximately 130,000 lines, or 9 percent of the lines, in SBC's Kansas service area.²³ This level of CLEC retail penetration, in aggregate, is approximately the same as the levels in New York and Texas at the time applications were filed in those states.²⁴ CLEC business lines in Kansas outnumber residential lines by approximately a 2:1 margin.²⁵ By contrast, two-thirds of the access lines in Kansas serve residential customers.²⁶ Long distance carriers account for only several thousand lines in Kansas, with residential lines accounting for fewer than 1000 of these.²⁷ CLEC penetration in Kansas is smaller than either the 20 percent penetration currently achieved in New York, or in Texas where the UNE platform

²³ See SBC Brief at ii and SBC Smith/Johnson Aff. ¶ 12 tbl. 3. Counting CLEC lines as the sum of E911 + UNE-P + Resale, there are approximately 1.46 million access lines in SBC's Kansas service area.

²⁴ In New York, CLECs served approximately 8.9% of total access lines. DOJ New York Evaluation at 9. In Texas, SBC estimated that CLECs served 12.8% of total access lines, but the Department concluded that CLECs actually served closer to 8.0% of the market. DOJ Texas I Evaluation at 8-9.

²⁵ See SBC Smith/Johnson Aff. ¶ 11 tbl. 2; ¶ 40 tbl. 9. Counting CLEC lines as the sum of E911 + UNE-P + Resale, there are approximately 47,000 CLEC residential lines and 86,000 CLEC business lines in SBC's Kansas service area.

²⁶ See *FCC Common Carrier Statistics* at 22 tbl. 2-4. Department calculations based on the FCC data indicate that approximately two-thirds of all Kansas access lines are residential.

²⁷ See SBC Smith/Johnson Aff. Attach. F ¶¶ 4, 26, 28. These same data show 11,000 - 12,000 interconnection trunks, possibly indicating additional facilities-based service in Kansas or in nearby states. Long distance carriers, as a group, have 280,000 telephone numbers assigned in Kansas, presumably to allow them to provide local telephone service in Kansas when they choose to do so or when circumstances permit.

alone accounted for almost a five percentile gain in penetration during the first nine months of the year 2000.²⁸

The predominant mode of CLEC entry in Kansas is the resale of SBC service. Resale lines serve approximately six and one-half percent of the total lines in SBC's Kansas service area, or more than two-thirds of total CLEC lines.²⁹ Essentially all CLEC residential service in Kansas is the resale of SBC service.³⁰ Long distance carriers have made no significant use of resale in Kansas.³¹ Almost half of resale lines in Kansas are served by a single CLEC.³²

Facilities-based CLEC lines make up one and one-half percent of the lines in SBC's Kansas service area.³³ The percentage of facilities-based lines compares with three and one-half percent in Texas and five and one-half percent in New York at the times of their 271

²⁸ Verizon Taylor Decl. ¶ 21 (CLECs served approximately 2.5 million lines in New York as of July 31, 2000); *see* SBC October 2000 Texas Performance Data, Texas PM 37-03 (Trouble Report Rate - UNE Loop and Port Combinations) at 271-No. 37 (168,669 UNE-Platform lines as of January 2000 and 760,391 UNE-Platform lines as of October 2000).

²⁹ *See* SBC Smith/Johnson Aff. ¶ 40 tbl. 9 (showing 94,758 resold lines in SBC's Kansas territory, as of August, 2000).

³⁰ *See* SBC Smith/Johnson Aff. ¶ 11 tbl. 2 (showing UNE-P and facilities-based CLEC entry in Kansas accounting for a total of only 709 residential CLEC lines).

³¹ *See* SBC Smith/Johnson Aff. Attach. E at 4, 5.

³² *Id.*

³³ *See* SBC Smith/Johnson Aff. ¶ 22 tbl. 5 (21,000 CLEC lines in Kansas are facilities-based, as measured by E911 listings.). The number of facilities-based lines includes lines served by stand-alone loops and thus is not comprised of "pure" facilities-based lines.

applications.³⁴ Virtually all facilities-based CLEC lines serve business customers.³⁵ Only one long distance carrier is currently providing a significant number of facilities-based lines in Kansas.³⁶

The UNE-platform constitutes approximately one percent of lines in the state of Kansas. No residential customers are served over the platform in the state.³⁷ The limited use of the UNE-platform contrasts sharply with the New York and Texas markets, where the use of UNE-platform has accounted for rapid CLEC expansion into the residential market.³⁸ DSL entry is also minimal. There are 556 CLEC DSL lines in Kansas, which constitute 0.038 percent of total lines in Kansas.³⁹

C. Conclusion

The small number of UNE-P lines served by CLECs in both Oklahoma and Kansas, and the small number of facilities-based residential lines served by CLECs in both Oklahoma and

³⁴ See DOJ Texas I Evaluation at 8 (Facilities-based CLEC lines were estimated to comprise 350,000-400,000 of the lines in SBC's Texas service area) and *FCC NY Order* ¶ 14 (showing 651,793 facilities-based lines at the time of application).

³⁵ See SBC Smith/Johnson Aff. ¶ 22 tbl. 5 (709 CLEC facilities-based lines serve residential customers.).

³⁶ See SBC Smith/Johnson Aff. Attach. E at 1.

³⁷ See SBC Smith/Johnson Aff. ¶ 11 tbl. 2; ¶ 22 tbl. 5 (Calculations from these tables indicate 17,045 UNE-platform lines are in use in Kansas, and none of these lines serve residential customers.).

³⁸ See *supra* note 21.

³⁹ See SBC October 2000 Kansas/Oklahoma Performance Data, Kansas PM 65-08 (Trouble Report Rate (%) for DSL) at 271-No. 65c (556 DSL lines as of Sept. 2000).

Kansas, are insufficient, alone, to justify a presumption that the Oklahoma and Kansas markets are fully open to these modes of entry and are fully open to competition for business and residential customers. These numbers compel a closer look at whether SBC has fully and irreversibly opened the Oklahoma and Kansas markets to all three modes of competition required by the Act for both business and residential customers, and, in particular in these states, whether: (1) interconnection, UNE and UNE-P rates and charges are properly cost-based; (2) interconnection, UNE, and UNE-P offerings by SBC meet reasonable levels of performance where requested or in use; and (3) SBC has shown that its interconnection and wholesale support systems and procedures are sufficiently close to those in Texas to ensure performance, and continuing performance, in conjunction with the established performance benchmarks and arrangements to prevent backsliding.

II. The Commission Should Independently Determine Whether Prices for Unbundled Elements in Oklahoma and Kansas Are Properly Cost-Based.

Local telecommunications markets cannot be fully and irreversibly open to competition unless the prices for the interconnection and UNEs are properly based on costs. The FCC has established the basic principles that must be followed in establishing these prices, requiring that the prices “must be based on an incumbent LEC’s forward-looking, long-run incremental costs for each network element.”⁴⁰ Prices which are not properly cost-based act as a barrier to entry; such prices may prevent entry entirely, or limit entry in type or scale.⁴¹

⁴⁰ *FCC New York Order* ¶ 237.

⁴¹ *See ConnectSouth Comments* at 4 (“On November 2, 2000, ConnectSouth notified the Arkansas Public Service Commission that it was withdrawing from the Arkansas

The FCC has reasonably concluded that in many circumstances it will rely heavily on pricing decisions made by state commissions, but this deference is not blind. If “basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce[.]” then the prices may be found to violate section 252 of the Telecom Act and to preclude the grant of a section 271 application.⁴² This analysis properly encompasses both the price-setting process and the level of the resulting prices. Ultimately, the FCC must make its own, independent, finding regarding the propriety of the prices.⁴³

Because of the Commission’s experience and expertise in rate-making issues -- particularly with respect to the proper interpretation and implementation of its prescribed TELRIC methodology -- the Department will not attempt to make its own independent determination whether prices are appropriately cost-based. But while we rely on the Commission for this ultimate determination, we urge the Commission to consider two factors in its threshold

market due to SWBT’s high collocation and UNE charges.”); *see also Oklahoma ALJ Pricing Recommendation* at 111 (testimony suggesting that Cox Oklahoma, a cable facilities-based competitor, may direct its local entry in reaction to Oklahoma UNE prices, “work[ing] around” certain higher rates by “deploying development and implementation strategies of its own.”).

⁴² *FCC New York Order* ¶ 244. This approach conforms to the principles articulated by the Department in a prior proceeding, in which the Department indicated that deference to a state commission’s pricing decisions would be justified if those decisions reflected “a reasoned application of an appropriate methodology.” DOJ South Carolina Evaluation at 35. *See also id.* at 39 (“[I]f a state commission has not explained its critical decisions, or has explained them in terms that are inconsistent with procompetitive pricing principles, the Department will require further evidence that prices are consistent with its open-market standard.”).

⁴³ *See* 47 U.S.C.A. §271(d)(3) (West Supp. 1999).

inquiry whether “the end result falls outside the range that the reasonable application of TELRIC principles would produce.”

First, the Commission should compare the prices established in a state with prices established in other states for the same unbundled element, especially with prices that have been previously examined by the Commission and found to be appropriately cost based. We recognize that differences in prices from one state to another do not necessarily indicate that the prices in either state are not appropriately cost based. Such differences may arise either from differences in costs between states, or from different judgments -- both of which are reasonable -- on rate making issues that are not susceptible to precise determination. Nonetheless, we believe comparisons with prices established in other states are a useful starting point in determining whether the Commission should undertake more careful scrutiny of the prices presented in a section 271 application. In the absence of persuasive evidence of differences in costs between states, substantial differences in prices should trigger more careful scrutiny by the Commission.

Second, the Commission should also consider the extent to which CLECs are purchasing unbundled elements at the established prices. If CLECs are purchasing and using an unbundled element in significant volumes, there will be less reason for concern that entry is being constrained by above-cost prices than would the case if there were little or no demand for the element at the established prices. As in the case of price comparisons between states, this factor does not necessarily indicate whether prices are or are not cost-based, because the level of demand may reflect factors other than price. Nonetheless, this factor may be a useful indicator of whether closer scrutiny of prices by the Commission is appropriate.

The record in this application clearly indicates that an independent scrutiny of prices by the Commission is appropriate. The recurring and non-recurring charges for unbundled elements in Oklahoma and the non-recurring charges in Kansas substantially exceed the level of charges in Texas that were examined by the FCC and found to be appropriately cost based. Moreover, SBC has not presented any convincing evidence that the differences in prices reflect any underlying differences in costs. UNE competition in Oklahoma and Kansas appears to be sparse, suggesting that entry may have been impeded by these rates.⁴⁴ Finally, the record in both states suggests that there may have been significant departures from the prescribed TELRIC methodology for determining costs and prices.

In addition to these concerns, collocation and a number of UNEs continue to be priced only on an interim basis in both Oklahoma and Kansas.⁴⁵ While interim rates in themselves do not require denial of a 271 application,⁴⁶ where, as here, the permanent rates are of concern, it is

⁴⁴ See *supra* notes 21, 38 and accompanying text; see also DOJ Massachusetts Evaluation at 17 (“[T]here is substantial reason to believe that UNE-Platform entry has been impeded by Verizon’s failure, at least perhaps until quite recently, to make certain network elements available to competitors at cost-based prices.”).

⁴⁵ In addition, at the time SBC filed its 271 application with the FCC, the Kansas non-recurring charges (NRCs) were still interim. Two weeks later, on November 3, 2000, the KCC issued a final pricing order on NRCs. *KCC NRC Order*. Unfortunately, the timing of this order was such that few commenters were able to fully analyze it in their November 15, 2000 comments. Whereas AT&T addressed the KCC’s order, Sprint mentioned it only in a footnote, and ConnectSouth did not refer to it at all.

⁴⁶ See *FCC Texas Order* ¶ 88 (“[T]he mere presence of interim rates will not generally threaten a section 271 application so long as an interim solution to a particular rate dispute is reasonable under the circumstances, the state commission has demonstrated its commitment to our pricing rules, and provision is made for refunds or true-ups once permanent rates are set.”).

additionally troubling to rely on interim rates to establish that the market is fully and irreversibly open to competition.⁴⁷

A. Oklahoma

Oklahoma's permanent prices do not appear to be cost-based: they far exceed the comparable cost-based rates from Texas, and the Oklahoma record suggests that this difference may reflect a failure to adhere to the Commission's TELRIC methodology. Oklahoma's promotional and other interim rates are similarly inadequate bases to support a finding that the local market is irreversibly open to competition.

1. Oklahoma's "permanent" prices may not be cost-based.

a. The rates adopted in the OCC's July 17, 1998 order appear to be excessive.

The majority of monthly recurring and service-initiating non-recurring rates for UNEs were set in Oklahoma by the OCC's order of July 17, 1998, which adopted the Amended Report and Recommendation of an Administrative Law Judge.⁴⁸ Both the recurring and non-recurring rates listed are substantially greater than the rates which were the basis for SBC's Texas application. In addition, the recurring rates in Oklahoma are much higher than the recurring rates in Kansas.⁴⁹

⁴⁷ See *FCC New York Order* ¶ 258; DOJ South Carolina Evaluation at 39.

⁴⁸ *OCC Pricing Order; Oklahoma ALJ Pricing Recommendation.*

⁴⁹ See AT&T Baranowski/Flappan Decl. ¶ 16 ("SWBT used the same cost model in Oklahoma and Kansas, and, not surprisingly, given the two states' very similar characteristics, estimated similar network element costs in Oklahoma and Kansas (with *higher* cost estimates for Kansas in a few instances).").